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Intelligence Law: What Notice Does It Require?

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Six years ago, Congress and the executive branch struck a bargain called the Intelligence Oversight Act of 1980.

The subject was congressional oversight of intelligence activities: what the president had to tell Congress about the activities of the CIA and other intelligence agencies, and when he had to tell them.

Disclosure of the Reagan administration's secret shipment of arms to Iran and the diversion of profits to aid the Nicaraguan rebels has made the meaning of the act again the subject of sharp debate.

When the law was signed by President Jimmy Carter, the executive branch was chafing under a 1974 law known as the Hughes-Ryan Amendment. Enacted after revelations of such CIA abuses as its plot to overthrow the government of Chilean President Salvador Allende, the Hughes-Ryan Amendment required the Central Intelligence Agency to report its covert operations to eight congressional committees.

Congress, on the other hand, was concerned that Hughes-Ryan gave the intelligence agencies too much leeway by requiring only that congressional committees be notified of covert activities "in a timely fashion"—a loophole that some legislators said permitted the president to inform Congress too long after the fact.

The Intelligence Oversight Act represented a classic compromise, a seeming truce in the separation-of-powers tug-of-war between the executive and legislative branches of government.

The executive branch secured repeal of Hughes-Ryan. Under the new law, it was required to report its covert activities to only two committees, the House and Senate intelligence panels.

In return, Congress won language tightening the reporting requirements to require prior notice of covert activities in all but the most unusual circumstances, and making clear that, even in those rare cases, the intelligence committees were to be informed promptly after the fact.

Or so the legislators thought.

Last Jan. 17, President Reagan signed a "finding" that the covert arms sales to Iran were in the national interest. But he did not inform Congress.

"I have the right under the law to defer reporting to Congress . . . and defer it until such time as I believe it can safely be done with no risk to others," Reagan said at a news conference last month, before the revelation of the diversion of funds to aid the Nicaraguan contras.

A reading of the law and its legislative history, however, indicates that Congress intended to provide the president with significantly less leeway than that.

Under the law, if the president "determines it is essential to limit prior notice to meet extraordinary circumstances affecting vital interests of the United States," the disclosure can be limited to eight top congressional leaders: the chairman and ranking members of the intelligence committees, and the leadership of both chambers.

And in those instances where there is no prior notice, the law requires that the president "fully inform the intelligence committees in a timely fashion" of the operations and explain why there was not advance warning.

The application of the law to the Iran arms shipments raises three interrelated questions:

- Did the president have authority to withhold prior notice of the plan?
- If he did, did he comply with the requirement that he provide timely notice?
- How do the timely notice provisions apply in a situation where the covert activity is a long-term, ongoing operation, like the Iranian arms sale, about which Congress was kept in the dark for 18 months after it started? Must the notice be given at the inception of the operation, or after it is over?

At the time the law was enacted, Congress and the executive branch agreed to disagree about the answer to the first question: the president's power to withhold prior notice of a covert action.

The preamble to the law states that it applies "to the extent consistent" with the authority "conferred by the Constitution upon the executive." The administration argued at the time that the president has power under the Constitution to withhold prior notice in some situations.

"We have never accepted that he does have that power, he has never conceded that he does not under certain circumstances, and the courts have never definitively resolved the matter," the late Jacob Javits (R-N.Y.) said in Senate debate on the bill. "But," he said, "we are leaving that dispute for another day."

Still, the legislators made it clear that they believed the intelligence committees as a whole had the right to be notified in all but—as the conference report on the act described it—"rare, extraordinary and compelling circumstances."

Sen. Daniel K. Inouye (D-Hawaii), former chairman of the Senate intelligence panel who will head the Senate select committee that is to take over the probe of the secret arms sales, said during floor discussion of the 1980 conference report, "I cannot conceive of any circumstance which would require the withholding of prior notice, except where the nation is under attack and the president has no time to consult with Congress before responding to save the country."

And then-Senate Majority Leader Robert C. Byrd (D-W.Va.) warned: "If the president were to undertake a significant intelligence activity without notice to Congress, he would not only jeopardize his relations with Congress but would call into question the wisdom of the activity."

Although the president may have some power under the Constitution to withhold information, "The president bypasses the procedural provisions of this bill and moves into this gray constitutional buffer zone at his peril," Byrd said. "This is because the presumption of this bill is that prior notice must be given to Congress, period."

The hearings and debate over the issue of "timely notification," in the event that prior warning is not given, make clear that the legislators did not contemplate the lengthy delay that occurred in the Iran case, in which the intelligence committees found out about the secret shipments from news reports.

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The executive branch was squeamish about being pinned down on exactly how soon the notification had to be given to be considered timely. However, Adm. Stansfield Turner, then CIA director, testified before the House: "The law requires that I inform you of findings for covert actions in a timely manner. I think you could take me to jail if I waited a month or two to tell you of something. I suppose there's some wild circumstance, but it just doesn't seem practical at all to me to think that that kind of delay could be anything but reprehensible and punishable."

In remarks concurred in by White House counsel Lloyd Cutler, along with the general counsel and legislative counsel to the CIA, then-Sen. Walter (Dee) Huddleston (D-Ky.), chairman of the subcommittee that drafted the law, said the president could not claim constitutional authority to withhold timely notice, only prior notice.

That leaves the question of how the timeliness requirement would apply in a covert operation that takes place over many months, such as the Iran operation, as opposed to just hours, such as President Carter's aborted mission to rescue the hostages taken from the U.S. Embassy in Iran, in which the intelligence committees did not receive prior notice.

Questioned on that subject in hearings before the Senate Select Committee on Intelligence, Turner said: "Activities which would have long-term consequences, or which would be carried out over an extended period of time, should generally be shared with the Congress at their inception. And I would have no objection to making this point in the legislative history."

Then-Sen. Birch Bayh (D-Ind.), seized on the word "generally" and the two men had this exchange:

Bayh: "What example of something like that should not be shared?"

Turner: "I cannot think of one."

Bayh: "That 'generally' business is a word of art, sort of like Mother Hubbard's skirt. It covers everything and touches nothing."

Turner: "Statements will be quoted back from these hearings for years to come, sir, and one has to be a little cautious."

Bayh: "If the Congress of the United States and the representatives of the people cannot be involved before that project moves beyond the point of recall, it seems to me we have not learned a great deal."

Turner: ". . . I do not think there is a problem on these long-term ones."

Staff researcher Michael Slevin contributed to this report.

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